

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

SOUTHERN BAKERIES, LLC

and

Case 15-CA-174022

BAKERY, CONFECTIONERY, TOBACCO
WORKERS, AND GRAIN MILLERS UNION

**GENERAL COUNSEL'S RESPONSE
TO THE BOARD'S NOTICE TO SHOW CAUSE**

Counsel for the General Counsel (General Counsel) respectfully submits this Response to the Notice to Show Cause issued by the National Labor Relations Board (Board) on October 15, 2018. For the reasons explained below, the General Counsel does not oppose the remand to the Administrative Law Judge for further proceedings consistent with the Board's decision in *The Boeing Company*, 365 NLRB No. 154 (2017) of the following four rules: 1) prohibiting conduct which damage the business or reputation of the Company; 2) prohibiting the use of Company time or resources for personal use without authorization; 3) prohibiting off-duty conduct which could impact an employee's ability to perform his job; and 4) prohibiting unauthorized entry by an employee. The remaining three rules at issue are prima facie lawful under *Boeing*, and the General Counsel respectfully requests that the Board dismiss those allegations.

I. Procedural Background

The Bakery, Confectionery, Tobacco Workers, and Grain Millers Union (the Union) alleged in the charge that Southern Bakeries, LLC (the Employer) violated Section 8(a)(1) of the

Act by maintaining certain unlawful rules.¹ An Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing issued on September 28, 2016. A hearing was held on January 11 and 12, 2017 in Hope, Arkansas, before Administrative Law Judge Arthur J. Amchan. ALJ Amchan rendered his decision on May 11, 2017 in JD-33-17, finding that some, but not all, of the alleged rules were unlawful.

On July 24, 2017, Respondent filed Exceptions to the ALJD. The General Counsel filed Cross-Exceptions on September 26, 2017 and submitted an Answering Brief to Respondent's exceptions on the same date. Respondent filed a Reply Brief in support of its exceptions on October 10, 2017, and an Answering Brief to the General Counsel's Cross-Exceptions on October 31, 2017. The General Counsel submitted a Reply Brief in support of the cross-exceptions on November 14, 2017.

While this case was pending before the Board on exceptions, the Board issued its decision in *The Boeing Company*, overruling the "reasonably construe" test in *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004).

On May 1, 2018, the Board issued a Decision and Order in the consolidated *Southern Bakeries* cases in which it severed Case 15-CA-174022 (the case herein) and retained those issues for future resolution. *Southern Bakeries, LLC*, 366 NLRB No. 78 (May 1, 2018).

The instant Notice to Show Cause issued on October 15, 2018.

II. The Board Should Remand Respondent's "Damage to Business or Reputation" Rule, the "Company Time" Rules, the "Off-Duty Conduct" Rule and the "Unauthorized Employee Access" Rule to the ALJ for Further Consideration

The General Counsel excepted to the ALJ's dismissal of the "Damage to Business or Reputation" rule under *Lutheran Heritage Village – Livonia*, which states:

¹ The charge was filed on April 14, 2016.

Facility Rules and Disciplinary Procedures. [...] Group A. These infractions are serious matters that often result in termination. These listed infractions are not all-inclusive. ***Any conduct, which could interfere with or damage the business or reputation of the Company***, or otherwise violate accepted standards of behavior, will result in appropriate discipline up to and including immediate discharge. (Second Consolidated Complaint ¶ 7(b), emphasis added).

The General Counsel does not oppose the remand to the ALJ of this work rule for further processing consistent with the decision in *Boeing*. Under *Boeing*, work rules affirming common standards of civility among employees are category 1 rules and are lawful. However, this rule prohibits disparagement or criticism of the Employer, which falls into category 2 and thus requires individualized scrutiny. The General Counsel submits that the negative impact of this rule upon employees' Section 7 rights is apparent, or alternatively outweighs any business justification the Respondent may advance in support of a contrary finding. Therefore, the General Counsel does not oppose that this rule, identified at Second Consolidated Complaint paragraph 7(b), be remanded to the ALJ for further processing consistent with the Board's decision in *Boeing*.

Respondent excepted to ALJ Amchan's decision finding that its "company time" rule to be unlawful. The rule, alleged in the Second Consolidated Complaint at paragraph 7(b)(i), is as follows:

Using Company time or resources for personal use unrelated to employment with the Company without proper authorization. This includes leaving Company property during paid breaks or leaving your assigned job or work area without permission.

Counsel for the General Counsel does not oppose the remand to the ALJ of this rule for further consideration, as it warrants individualized scrutiny. This rule should be remanded to the ALJ for examination in light of the *Boeing* decision.

The General Counsel excepted to the ALJ's dismissal of the follow rule pertaining to off-duty conduct by employees:

Any off-duty conduct, which could impact, or call into question the employee's ability to perform his/her job. (Second Consolidated Complaint ¶ 7(b)(ii)).

This rule warrants individualized scrutiny under *Boeing*, as it seeks to regulate off-duty conduct by employees. Thus the General Counsel does not oppose remand of this rule. The General Counsel also does not oppose remand of the following rule prohibiting off-duty employee access to Respondent's facility:

Bringing or allowing any non-employee inside the facility (including the break room) without prior permission from management. ***Unauthorized entry by employee.*** (Second Consolidated Complaint ¶ 7(c), emphasis added).

III. The Board Should Dismiss the "Civility" Rule and the Rules Prohibiting Audio and/or Video Recordings Pursuant to *Boeing*

The General Counsel respectfully requests that the Board dismiss the following work rule allegations as such rules have been held to be prima facie lawful under *Boeing*:

Facility Rules and Disciplinary Procedures. [...] Group A. These infractions are serious matters that often result in termination. These listed infractions are not all-inclusive. Any conduct, which could interfere with or damage the business or reputation of the Company, ***or otherwise violate accepted standards of behavior,*** will result in appropriate discipline up to and including immediate discharge. (Second Consolidated Complaint ¶ 7(b), emphasis added).

* * *

Cameras or Imaging Devices. Employees, contractors, and visitors may not carry cameras or imaging devices into any Southern facilities. This includes: (1) conventional film, still cameras; (2) digital still cameras; (3) video cameras; (4) PDA cameras; (5) cell phone cameras. An employee with authorization to take pictures in the facility must sign in at the front reception desk and be given a Photographer's Pass. This pass must be worn at all times while shooting pictures. A Southern management employee must accompany the employee. (Second Consolidated Complaint ¶ 7(a)).

* * *

Unauthorized use of still or video cameras, tape recorders, or any other audio or video recording devices on Company premises, in a Company supplied vehicle, or off-Company premises involving any current or former Company employee, without such person's expressed permission while on Company business. (Second Consolidated Complaint ¶ 7(b)(iii)).

In light of the clear dictates of *Boeing*, remanding these work rule allegations to the ALJ would expend unnecessary time and resources. Each of these rules, when considered under the “reasonable interpretation” standard as set forth in *Boeing*, would not prohibit or interfere with the exercise of employees’ rights under Section 7 of the Act and/or the potential adverse impact on protected rights is outweighed by apparent business justifications associated with the rules. The General Counsel requests that the Board dismiss paragraph 7(a), the cited portion of paragraph 7(b) referencing “accepted standards of behavior,” and paragraph 7(b)(iii) of the Second Consolidated Complaint in lieu of remanding the work rules for further consideration by the ALJ.

IV. Conclusion

For the reasons stated above, the General Counsel does not oppose the remand of the “damage to business or reputation” rule, the “company time” rules, the “off-duty conduct” rule and the “unauthorized employee access” rule, as alleged in the Second Consolidated Complaint at paragraphs 7(b), 7(b)(i), 7(b)(ii) and 7(c), to the ALJ for further consideration. Further, the General Counsel respectfully requests that the Board dismiss the allegations at paragraphs 7(a), part of 7(b) and 7(b)(iii) pleading the “accepted standards of behavior” rule and rules pertaining to video and audio recordings to be unlawful.

Dated at Memphis, Tennessee this 29th day of October 2018.

/s/ Linda Mohns

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2018, a copy of Counsel for the General Counsel's Response to Notice to Show Cause was filed via E-Filing with the NLRB Office of Executive Secretary.

I further certify that on October 29, 2018, a copy of Counsel for the General Counsel's Response to Notice to Show Cause was served by e-mail on the following:

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I further certify that on October 29, 2018, a copy of Counsel for the General Counsel's Response to Notice to Show Cause was served by regular mail upon the following:

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